CPLJ
Comparative
Procedural Law and Justice

PART XIV

CROSS-BORDER AND INTERNATIONAL DIMENSIONS

Chapter 4

Access to Courts (International Jurisdiction)

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1 This chapter is concerned with the availability of courts to litigants in international disputes. The issue arises differently from the issue of the availability of courts in domestic disputes. In a domestic setting, all courts were established by a single sovereign, which has the power, that it will typically exercise, to allocate jurisdiction between the courts that it has established through rules of territorial and subject matter jurisdiction.[1] In contrast, there are no rules of international law allocating jurisdiction between the courts of different nations.[2] States define the jurisdiction of their courts unilaterally, and may not grant (or deny) jurisdiction to the courts of foreign States.[3] As a consequence, the international jurisdiction of the courts of different nations is not neatly allocated between them, but rather overlaps[4] or (more rarely) results in no court retaining jurisdiction over a given dispute. Most States have thus established doctrines addressing the issue of parallel litigation[5] or negative conflicts of jurisdiction, but these doctrines are also unilateral and may fail, in particular by allowing parallel litigation.

2 An intermediate situation can exist where States enter into a political project of regional integration. The scope of such projects varies, and they often have limited influence on international civil procedure.[6] But some of these projects are more ambitious and aim at establishing a regional area of justice where borders will lose most of their significance and where the participating sovereigns accept to consider the judicial systems of each other as equivalent and fungible. The most prominent example is the project of the European Union, and certain associated States of the European Free Trade Association,[7] which have adopted common rules of jurisdiction and a simplified regime of recognition

[1] See pt III

[2] On the claim that international law constrains jurisdiction to adjudicate, see 1.1.1.

[3] It has been argued that a global theory of international jurisdiction could nevertheless be designed as a theory of horizontal regulation of international jurisdiction whereby States would exercise self-restrain by subjecting themselves to a requirement of reasonableness: L Usunier, *La régulation de la competence juridictionnelle en droit international privé* (Litec 2008) and the English summary in L Usunier, *Regulating the Jurisdiction of Courts in Int'l Litigation: Towards a Global Answer in Civil and Commercial Matters,* 9 Yearbook Pr. Int'l L. 2007 541. As recognized by the author, her theory is difficult to reconcile with the widespread existence of exorbitant rules of jurisdiction which do not reveal any form of restraint, and with the absence of any rule of customary international law constraining adjudicatory jurisdiction: see 1.1.1.

[4] D Fernandez Arroyo, *Compétence exclusive et compétence exorbitante dans les relations privées internationales* (Collected Courses of the Hague Academy of International Law 323 2006) 23, 37.

[5] See Part 14, Chapter 8.

[6] M Weller, *Mutual Trust: A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?* (Collected Courses of the Hague Academy of International Law 49, 2022) 423 showing, in particular, the limitations in this respect of the ASEAN and of MERCOSUL (para 332: 'the conceptual attitude of the MERCOSUR instruments for judicial cooperation technically focused on a full preservation of national sovereignty').

[7] Iceland, Norway and Switzerland have concluded with the EU the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1988, which mirrors the Brussels Ibis Regulation (see next n 8). The European Commission considers that it is an instrument closely related to the political project of the EU, and that, on this ground, it can only be ratified by States participating in this project. As a result, England was denied the right to accede after Brexit.

and enforcement of foreign judgments.[8] The overarching principle of this European regime is that of mutual trust in the civil justice system of other Member States.[9] As a result, intra-European disputes governed by this regime are not genuinely international anymore, as they concern States which share a common judicial area and have agreed to trust each other's civil justice system.[10] This explains why most of the rules could be inspired by the domestic rules of territorial jurisdiction of the Member States, which operate in a context of fungible courts, and why the rules discriminating against foreign parties were banned. The purpose of the European regime can thus be presented as allocating jurisdiction between the participating States and multilateral. This does not reveal a different paradigm of jurisdiction in Europe,[11] but rather the fact that the participating States are engaged in a political project, which is essentially federal in nature. In disputes between European-based plaintiffs and defendants based in third States, the courts of the Member States define freely and unilaterally the international jurisdiction of their courts on the basis of their national rules of international jurisdiction, including their exorbitant rules of jurisdiction that the European regime forbids to use in intra-European disputes.

3 In many countries, the issue of the availability of courts in international disputes is addressed through a fundamental distinction between the overall power of courts to decide certain disputes (in France: *pouvoir*, in Germany: *Gerichtsbarkeit*) and the (typically unilateral and uncoordinated) allocation of such power, when it does exist, between the courts of different nations (in France: *compétence*, in Germany: *Zuständigkeit*).[12] The distinction is essentially relevant to distinguish between the lack of power of (foreign) courts over States benefiting from immunity of suit, and the lack of jurisdiction of a given

[8] The European Union has adopted uniform rules of jurisdiction through a number of EU Regulations applicable in different fields of the law: civil and commercial matters (Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 1215/2012 of 12 December 2012 (EU), hereafter 'Brussels Ibis Regulation'), matrimonial matters and parental responsibility (Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), 2019/1111 of 25 June 2019 (EU), hereafter 'Brussels IIter Regulation'), succession (Regulation of the European Parliament and of the Council of on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, hereafter 'Succession Regulation', 650/2012 of 4 July 2012 (EU)), etc.

[9] See Preamble to Brussels Ibis Regulation, Recital 26; *Eric Gasser Gmbh v MISAT srl*, Case C-116/02 (CJEU), Judgment 9 December 2003 [ECLI:EU:C:2003:657]: 'the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect'.

[10] H Muir Watt and D Bureau, *Droit international privé* (5th ed 2021) para 123.

[11] See however R Michaels, 'Two Paradigms of Jurisdiction' (2006) 27 Michigan Journal of International Law 1003, 1003-1039, presenting the Brussels Regulation as representative of European law, and characterizing it as horizontal, multilateral and international.

[12] R Michaels, *V° Jurisdiction, Foundations Encyclopedia of Private International Law* (Elgar 2017) 1042.

court over a private dispute because none of the grounds of jurisdiction established by the forum would be met.[13]

1 CONSTRAINTS

1.1 Public International Law

4 Although states might enter into agreements[14] or participate in federal projects resulting in the harmonization of their rules of international jurisdiction,[15] the fundamental principle is that each State defines the jurisdiction of the courts that it has established. This is a consequence of the exclusive power recognized by public international law to each State to organize itself and define the scope of the power of its own authorities.

5 A commonly held view, which has been endorsed by the courts of certain States, is that public international law also constrains States in the determination of the rules of international jurisdiction and largely defines the scope of the immunities of States from the jurisdiction of the courts of other sovereign States. The practice of States, however, shows otherwise, and a more accurate proposition is that States are essentially unconstrained by public international law to determine the jurisdiction of their courts to adjudicate private disputes (a), and that immunities of States are primarily defined at national level (b).

1.1.1 Jurisdiction to Adjudicate

6 The relevance of public international law in the determination of the rules of international jurisdiction of the courts of individual states is debated. The main reason is that the

[13] An important consequence should be that rules determining the power of courts to decide disputes such as rules defining the scope of immunity from jurisdiction of States should have no influence on rules allocating jurisdiction over private disputes between the courts of different States such as the Brussels I Regulation: see N Joubert, 'Chroniques d'un malentendu: les relations entre les immunités de juridiction et le Règlement Bruxelles I' (2014) Revue de droit commercial 53. The distinction, however, was not clearly perceived by the CJEU: see *LG v Rina*, Case C-641/18 (CJEU), Judgement 7 May 2020 [ECLI: ECLI:EU:C:2020:349], para 53.

[14] There are few of them. The most important formulating agency in the field of private international, the Hague Conference on Private International Law (HCCH), has essentially sponsored international conventions on choice of law. The work of the HCCH on the adoption of a convention harmonizing rules of international jurisdiction has failed (A Philip, 'The Global Hague Judgments Convention: Some Comments' and D Bennett, 'The Hague Convention on Recognition and Enforcement of Foreign Judgments – A failure of characterization', in T Einhorn and K Siehr (ed), *Intercontinental Cooperation Through Private International Law: Essays in Memory of Peter E. Nygh* (T.M.C. Asser Press, The Hague 2004) ; C Carmody, Y Iwasawa and S Rhodes (ed), *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (ASIL Baltimore 2003); J.J Barceló III and K.M Clermont, *A Global Law of Jurisdiction and Judgments: Lessons from The Hague* (Kluwer Law International, The Hague, London, New York 2002). It however led to the only important exception, the adoption of the Hague Convention on Choice of Court Agreement 2005. On the Lugano Convention, see n 7.

[15] The most prominent example is the European Union which has adopted uniform rules of jurisdiction through a number of EU Regulations applicable in different fields of the law: see text accompanying n 8.

sources of public international law in this respect are old and scarce. The main one is the ruling of the International Court of Justice in the *Lotus* case,[16] which distinguished between jurisdiction to prescribe and jurisdiction to enforce, and held that public international law limits the latter, but not the former.

7 A widely shared view is that the jurisdiction of courts to decide disputes ('jurisdiction to adjudicate') is a subset of jurisdiction to prescribe and is thus subject to the same legal regime. In France, scholars consider that States have complete freedom to determine their jurisdiction to prescribe and to adjudicate private disputes.[17] American courts and scholars have traditionally distinguished three categories of jurisdiction since the Restatement (Third) of Foreign Relations Law (1987), and considered that jurisdiction to adjudicate, like jurisdiction to prescribe, is not limited by customary international law.[18] American courts have ruled that orders directed to parties properly before them resort to jurisdiction to adjudicate rather than jurisdiction to enforce, and are thus not limited by customary international law.[19]

8 In other jurisdictions, however, scholars have argued that public international law has evolved, and imposes limits on the jurisdiction to adjudicate of states. One of the main proponents of this doctrine was F A Mann,[20] which might explain why the doctrine has been influential in England.[21] This limit would consist in the requirement that there be a 'genuine link' between the parties and/or the subject matter of the dispute and the territory of the relevant state.[22] While the existence of such a limit might be desirable, it seems difficult to consider that it is an actual requirement of customary international law given that state practice contradicts it: the vast majority of states have exorbitant rules of

[16] *France v Turkey*, Case No 9 (PCIJ), Judgment 7 September 1927, (ser. A) No. 10, ICGJ 248.

[17] P Mayer, 'Droit international privé et droit international public sous l'angle de la notion de compétence' (1979) Revue critique de droit international privé 1 ; H Muir Watt and D Bureau (n 10) 61.

[18] Restatement (Fourth) of Foreign Relations Law 2018, Introductory note to § 431.

[19] Restatement (Fourth) of Foreign Relations Law 2018, § 431, note 2.

[20] F A Mann, *The Doctrine of Jurisdiction in International Law* (Collected Courses of the Hague Academy of International Law 1 1964) 111 ; *The Doctrine of International Jurisdiction Revisited after Twenty Years* (Collected Courses of the Hague Academy of International Law 9 1984) 186; A F Lowenfeld, *International Litigation and the Quest for Reasonableness, General Course on Private International Law*, (Collected Courses of the Hague Academy of International Law 82 1994) 245.

[21] *Société Eram Shipping Company Limited (Respondents) and others v Hong Kong and Shanghai Banking Corporation Limited (Appellants)* (House of Lords, United Kingdom) [2003] UKHL 30, Judgment 30 of 12 June 2003.

[22] M Szpunar, 'Territoriality of Union Law in the era of globalisation', in D Petrlík, M Bobek, JM Passer, A Masson (ed), *Evolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux - Liber Amicorum Jiří Malenovský* (Bruylant 2020) 149 ff.

jurisdiction[23] which allow them to retain jurisdiction in cases where no meaningful link exists between the jurisdiction of the court and the dispute.[24]

1.1.2 State Immunity

9 State immunity is a rule of customary international law which defines the limits of the power of domestic courts to entertain claims against foreign States. It derives from the principle of sovereign equality of States: *par in parem non habet imperium*.[25] Customary international law affords States, their officials and their instrumentalities an immunity exempting them from suit in the courts of other sovereign States. However, it was always admitted that States could consent to such an exercise of power by another State and waive their immunity.

10 In the absence of a widely ratified international convention on immunities,[26] customary public international law developed from States' practice. The doctrine of State immunity was initially absolute and prevented any suit against foreign States. However, over the course of the twentieth century, many States began to adopt a 'restrictive theory' that treated foreign states and their agencies and instrumentalities the same as private actors for commercial activities while retaining sovereign immunity for States' sovereign and public activities.

11 Beyond the recognition of the principle of a restrictive theory and of the possibility to waive State immunity, there are so many divergences in State practice that many scholars question the existence of any other rule of customary international law.[27] Indeed, many States, in particular in the common law world, have adopted statutes regulating state immunities which have been found to be comprehensive codes excluding the direct

[23] Cf 3.6.

[24] M Akehurst, 'Jurisdiction in International Law' (1972-73) 46 *British Yearbook of International Law* 145, 176; D.E Childress III, 'V° Jurisdiction, Limits under International Law'*, Encyclopedia of Private International Law* (Elgar 2017) 1055. In particular, it is noteworthy that the European Union has excluded the use of such exorbitant rules within the scope of EU Regulations, but validated them in relations with third states: *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line*, Case C-391/95 (CJEU), Judgment 17 November 1988 [ECLI:EU:C:1998:543].

[25] *Germany v Italy; Greece intervening, Jurisdictional Immunities of the State*, Judgment 3 February 2012, [Reports 2012] 99, para 57.

[26] In Europe, 7 States have ratified the European Convention on State Immunity 1972.

[27] R Garnett, 'Should the Sovereign Immunity Be Abolished?' (1999) 20 *Australian Yearbook of International Law* 175 ; A Orakhelashvili, 'Jurisdictional Immunity of States and General International Law – Explaining the *Jus Gestionis* v *Jus Imperii* Divide' in T Ruys, N Angelet and L Ferro (ed), *The Cambridge Handbook of Immunities and International Law* (Cambridge 2019) 122.

application of international law.[28] Ultimately, the biggest part of the regime of State immunities is governed at a national level.[29]

12 The United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 was adopted to 'contribute to the codification and development of international law and the harmonization of practice in this area'.[30] It has not, however, been ratified by enough States to enter into force. The International Court of Justice has clarified that some of its provisions should already be considered as representative of customary international law, but that those provisions which were hotly debated should not.[31] 'It is therefore necessary to distinguish between those provisions of the Convention which were essentially declaratory and those which were legislative in the sense that they sought to resolve differences rather than to recognize existing consensus'.[32] It follows that the provisions of the UN 2004 Convention cannot be considered as reflecting customary international law without conducting a survey of state practice.[33] In Europe, however, the European Court of Human Rights (ECtHR) has ruled otherwise on certain specific issues (primarily, employment contracts,[34] but also torts[35]) for more than a decade. After ruling that it could not review the conduct of the contracting States which comported with international law, it unnecessarily and controversially decided that the provisions of the UN Convention that it deemed to reflect international law would also be the threshold of the demands of the right to a fair trial.[36] As a result, the supreme courts of several European States also ruled that Article 11 of the UN Convention reflects customary international law as far as immunity of suit in employment litigation is concerned.[37] Whether the UN Convention reflected international law in this respect was strongly

[28] See, in the US, *Siderman de Blake and others v Argentina and others,* No 85-5773 (US Court of Appeals, US) [965 F.2d 699 (9th Cir. 1992)] Judgment of 22 May 1992, in the UK *Al- Adsani v Government of Kuwait*, (Court of Appeal, England and Wales), Judgment of 29 March 1996, [1996] 2 LRC 344 and in Canada*: Kazemi Estate v Islamic Republic of Iran*, (Supreme Court, Canada) Case 35034, Judgment of 10 October 2014, [2014 SCC 62].

[29] R Garnett (n 27) 175.

[30] See Preamble of the UN Convention on Jurisdictional Immunities of States and Their Property 2004.

[31] *Germany v Italy; Greece intervening* (n 25), para 117, on Art 19 of the UN Convention.

[32] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs,* Case 2015/0063 (Supreme Court, UK), Judgment 18 October 2017 [2017] UKSC 62, para 32.

[33] R Pavoni, 'The Myth of the Customary Nature of the United Nations Convention on the State Immunity: Does the End Justify the Means?', in A van Aaken and I Motoc (ed), *The European Convention on Human Rights and General International Law* (OUP 2018) 282.

[34] *Cudak v Lithuania,* Case 15869/02, (ECtHR) Judgment 23 March 2010, para 66; *Sabeh El Leil v France*, Case 34869/05, (ECtHR) Judgement 29 June 2011, para 54; *Radunović v Montenegro,* Case 45197/13, (ECtHR) Judgment 25 October 2016, para 69.

[35] *Oleynikov v Russia*, Case 36703/04, (ECtHR) Judgment 14 March 2012, [Art 12: territorial tort exception] para 66.

[36] *Cudak v Lithuania* ; *Sabeh El Leil v France* ; *Radunović v Montenegro* (n 34).

[37] See e.g. *ICE*, Case 18-24.643 (Court of Cassation, France), Judgment of 1 July 2020 and *Ambassade du Ghana*, Case 18-13.790 (Court of cassation, France), Judgment of 27 November 2019, *États-Unis d'Amérique c. P.VN,* Case S.15.0051.N (Court of Cassation, Belgium), Judgment of 4 March 2019 (2020) Journal des Tribunaux 595.

doubted by several Advocate-Generals of the CJEU[38] and, after the UK Supreme Court expressed clearly its disagreement,[39] the ECtHR has eventually recognized the conflict,[40] which might be the first step towards a reconsideration of its caselaw.

13 While most States have adopted the restrictive theory, they define it differently. The most common form is to establish a commercial exception providing for the jurisdiction of the courts of the forum over disputes arising out commercial activities of foreign States performed in the territory of the forum.[41] Certain States, however, have adopted a broader distinction between public and private activities.[42] The distinction between private and public activities can either focus on the nature of the activity or on its purpose. Under the law of many States, it is the exercise of public powers, which are unavailable to private persons, which defines public activities and thus makes the foreign States carrying them immune from suit in the forum.[43] However, under the law of other States, the purpose of the activities of the foreign State can suffice, and it can be enough that they are in the public interest.[44]

14 The scope of sovereign immunity with respect to employment contracts varies. It is widely accepted that it is limited to disputes related to employees who participated in the exercise of the public authority of the relevant State (for instance, the diplomatic functions of a mission) and that, by contrast, employment disputes related to employees involved in administrative and technical functions which could have been performed in private organizations are not immune from the jurisdiction of foreign courts. This is the application of the general criterion to define the scope of sovereign immunity, and there is no special provision on contracts of employment in certain States.[45] In contrast, States

[38] *A Mahamdia v People's Democratic Republic of Algeria,* Case C-154/11 (CJEU), Judgment of 19 July 2012 [ECLI: ECLI:EU:C:2012:309], Opinion of A.G. M. P Mengozzi] para 26 ; *LG v Rina,* Case C-641/18 (CJEU), Judgment of 7 May 2020 [ECLI:EU:C:2020:3], Opinion of A.G. M Szpunar) para 38.

[39] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs,* (n 32).

[40] *Benkharbouche and Janah v UK,* Case 19059/18 and 19725/18 (ECtHR), Judgment of 5 April 2022.

[41] See US Foreign Sovereign Immunities Act 1976 (28 USC. 1605), UK State Immunity Act 1978, s 3.

[42] In France, see *Administration des chemins de fer du gouvernement iranien c/ Sté Levant Express Transport*, Case 67-10.243 (Court of cassation, France), Judgment 25 February 1969; *Dame Soliman v École saoudienne de Paris et Royaume d'Arabie saoudite*, Case 00-45.629 (Court of cassation, France), Judgment 20 June 2003.

[43] *Playa Larga (Owners of Cargo Lately Laden on Board) v I Congreso del Partido (Owners),* Case 1 AC 244 (House of Lords, UK), Judgment of 16 July 1981 [1981] UKHL J0716-2; *Claim against the Empire of Iran Case,* Case 45 ILR 57 (Constitutional Court, Germany), Judgment 30 April 1963.

[44] *Dame Soliman v École saoudienne de Paris et Royaume d'Arabie saoudite* (n 42).

[45] This is the case under the US Foreign Sovereign Immunities Act: the general provision on commercial transactions applies: *Saudi Arabia v Nelson,* No 91-522 (Supreme Court, US) [507 US 349 (1993)] Judgment of 1993, 360. The CJEU has also applied its general criterion to determine whether an embassy was immune from suit by an employee: see *A Mahamdia v People's Democratic Republic of Algeria,* Case C-154/11 (CJEU), Judgment 19 July 2012 [ECLI: ECLI:EU:C:2012:309].

take different positions on whether the nationality of the employee,[46] or his/her diplomatic status,[47] is relevant in this respect, which suggests that there is no converging state practice, and thus no rule of customary international law, with respect to these specific exceptions.

1.2 Fundamental Rights

15 Irrespective of whether the power of States to define the international jurisdiction of their courts is limited by rules of customary international law, it can also be limited by national or regional rules granting fundamental rights to litigants. In particular, national constitutions or regional conventions may establish fundamental rights guaranteeing access to courts and due process which could limit the freedom of States to define the international jurisdiction of their courts or incentivize them to use it with restraint.

16 The shift in paradigm which led to an evaluation of the fairness of cross-border jurisdiction was initiated by the US Supreme Court in 1945. In *International Shoe Co. v Washington,*[48] the court held the Fifth and Fourteenth Amendments of the US Constitution ('Due Process Clause') require that courts retain jurisdiction only over defendants who had minimum contacts with the forum state, and that it would otherwise offend 'traditional notions of fair play and substantive justice'. The protection of the Due Process Clause also applies to foreign based defendants,[49] thereby offering a universal guarantee of fair exercise of the jurisdiction of American courts. On this basis, the US Supreme Court has excluded property-based jurisdiction (quasi in rem jurisdiction), unless the subject matter of the dispute is the relevant property itself.[50] The Supreme Court, however, has interpreted the Due Process clause in the light of the traditional common law practice which was prevalent at the time of the adoption of the clause. As a result, jurisdiction based on physical presence within the jurisdiction of the court ('tag jurisdiction') was found to necessarily comport with Due Process,[51] although its fairness for defendants is disputable.

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[46] Under the law of certain States, and under certain international instruments, foreign States are immune if the employee was one of their nationals or was not a national of the forum: see UK State Immunity Act 1978, s 4(2); European Convention on State Immunity 1972, Art 5(2). The nationality of the employee is irrelevant under the law of many other States, such as the US: *El-Hadad v United Arab Emirates,* No 99-7220 (District of Columbia Circuit Court, US) [216 F.3d 29 (D.C. Cir. 2000)] Judgment of 16 June 2000.

[47] Under the law of certain States, the employment of members of a diplomatic mission, irrespective of their functions, is covered by State immunity: UK State Immunity Act 1978, 16(1)(a). See also, in Ireland: *Government of Canada v Employment Appeals Tribunal and Burke*, Case 95 ILR 467, Judgment 12 March 1992 500. The same rule is found in the 2004 U.N. Convention, Art 11(2)(b).

[48] *International Shoe Co. v Washington*, No 107 (Supreme Court, US) [326 US 310 (1945)] Judgment 3 December 1945.

[49] *Asahi Metal Industry Co. v Superior Court of Cal., Solano* Cty, No 85-693 (Supreme Court, US) [480 US 102 (1987)] Judgment 24 February 1987.

[50] *Shaffer v Heitner*, No 75-1812 (Supreme Court, US) [433 US 186 (1977)] Judgment 24 June 1977.

[51] *Burnham v Superior Court of California, County of Marin,* No 89-44 (Supreme Court, US) [495 US 604 (1990)] Judgment 29 May 1990.

17 In Germany, the Federal Court of Justice adopted a restrictive interpretation of the German provision establishing property based jurisdiction[52] by adding a requirement of a meaningful connection between the dispute and Germany, but refrained from ruling that the provision would otherwise violate the constitution or customary international law.[53] In contrast, the French supreme court for civil and criminal matters (*Cour de cassation*) refused to allow a litigant to challenge the constitutionality of nationality based jurisdiction[54] on the ground that it would violate the right to a fair trial.[55]

18 While the initial focus of the assessment of the fairness of jurisdictional rules was on defendants, the rights of claimants should also be considered. In particular, their right to access to court should be protected. Claimants should have reasonable possibilities, according to the circumstances, to bring legal proceedings.[56] In practice, however, courts typically define broadly the jurisdiction of their courts. The issue arises whether the right to access to court could entail an obligation to assume jurisdiction even in cases with no genuine connection to the forum where more closely connected courts would not be available *(forum necessitatis)*: the European Court of Human Rights has held that neither international law, nor the European Convention on Human Rights impose it.[57]

2 PARADIGMS

19 There are two radically different paradigms for conceiving international jurisdiction and the interests that it serves.[58]

20 In the first paradigm, which is dominant in the civil law tradition, jurisdiction is determined on the basis of rigid rules establishing heads of jurisdiction. These heads of jurisdiction can advance various interests,[59] but the rules are rigid and automatically grant jurisdiction where the relevant ground of jurisdiction exists. As a result, they afford a right to plaintiffs to initiate proceedings in, and thus access, the relevant court. Such rigid rules of jurisdiction ensure predictability and are easier and quicker to apply. They arguably offer

[52] Code of Civil Procedure (GCCP) 1887 (Germany) s 23.

[53] Case XI ZR 206/90 (BGH, Germany), Judgment 2 July 1991.

[54] Civil Code 1804 (France), Art 14.

[55] Case no 11-40101 (Cour de cassation, France), Judgment 29 February 2012. In Luxembourg, courts held that the same provision did not violate the principle of equal treatment: cf Case no 36358, (Cour of Appeal, Luxembourg), Judgment 6 November 2013 (2014) Journal des tribunaux Luxembourg 81, with obs. P. Kinsch.

[56] Case 61/2000 (Tribunal Constitucional, Spain), Judgment 13 March 2000.

[57] *Naït-Liman v Switzerland*, Case 51357/07 (ECtHR) GC, Judgment 15 March 2018, B Hess and M Mantovani, in F Ferrari/ P Fernández Arroyo (ed), *Private International Law – Contemporary Challenges and Continuing Relevance* (2019), 293 ff.

[58] R Michaels has also argued that there are two paradigms for conceiving international jurisdiction, but different ones: see Michaels, (n 11) and (n 12).

[59] Cf 4.3.

a more efficient regulation of jurisdiction.[60] They are also well suited to legal traditions which have traditionally disfavoured judicial discretion.

21 In the second paradigm, which is dominant in the common law tradition, jurisdictional rules are more complex and incorporate, in addition to an analysis of the geographical proximity of the dispute with the forum, an overall analysis of the appropriateness of exercising jurisdiction in the particular case.[61]

22 The factors considered in the assessment of the appropriateness of the exercise of jurisdiction in international cases and the exact formulation of the test vary by jurisdiction. In most common law jurisdictions, courts focus on the private interests of the parties.[62] They consider whether an alternate forum exists and whether it would be actually available and fair to all parties. They often consider the connections of the dispute with the contemplated courts. They consider the applicable law and, as the case may be, the costs for ascertaining its content if it is not the *lex fori*. Finally, and most importantly, they consider the availability of and ease of access to the evidence, and the costs of presenting it to each of the contemplated courts (in particular, the costs of bringing witnesses to each court).[63] In addition, courts in the United States uniquely consider public law factors. They compare the caseload of each court, the comparative interest of each jurisdiction in resolving the controversy and give preference to the court which would apply its own law under its choice of law principles.[64]

23 Unlike the civil law approach, the common law approach arguably brings significant legal uncertainty, but it makes possible an assessment of the fairness of jurisdiction in each individual case.[65] It is more focused on individual interests.[66] It is conceivable in legal systems where judicial discretion is widely accepted.

2.1 Rigid Application of Jurisdictional Rules

24 In the civil law tradition, the jurisdiction of courts is governed by rigid rules which do not grant any discretion to courts. The rules only rely on geographical connecting factors such

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[60] R Brand, 'Access to Justice Analysis on a Due Process Platform' (2012) Columbia Law Review Sidebar 112 76, 80.

[61] Strictly speaking, doctrines granting discretion to common law courts to stay proceedings on the ground that they are not the most appropriate forum (*forum non conveniens*) are not concerned with granting jurisdiction to the court, but rather with the exercise of jurisdiction.

[62] See, declining to take into account public law interests, *Lubbe v Cape Plc,* Case 1 W.L.R. 1545 (House of Lords, UK) Judgment 20 July 2000 [2000] UKHL J0720-4.

[63] *Spiliada Maritime Corpn v Cansulex Ltd,* Case AC 460 (House of Lords, UK) Judgment 19 November 1986.

[64] *Piper Aircraft Co. v Reyno,* No 8048 (Supreme Court, US) [454 US 235 (1981)] Judgment 8 December 1981, 257.

[65] For a critique of the doctrine in the United States, see M Gardner, 'Retiring Forum Non Conveniens' (2017) 92 New York University Law Review, 390.

[66] R Brand, (n 60) and (n 80).

as the domicile of the defendant or the place of performance of certain obligations of the contract, and do not integrate any other analysis of the appropriateness of the exercise of the jurisdiction over a particular defendant or in a particular dispute.[67]

25 Importantly, most jurisdictional rules were often borrowed from domestic civil procedure. Rules allocating jurisdiction between the various courts of the forum state were considered as appropriate to assess the international jurisdiction of courts. In French parlance, they were 'elevated to the international level'.[68] In German parlance, they had a dual function.[69] As a result, rules which were developed to allocate jurisdiction between essentially identical courts were used to decide whether the forum should retain or decline jurisdiction, and thus assume that the plaintiff would sue in a court that could be dramatically different from the courts of the forum.[70] The peculiarity of international litigation was either denied or ignored.[71] A possible explanation is that the parliaments in these jurisdictions had often only intervened to address the issue of domestic jurisdiction and that courts in the civil law tradition did not feel legitimate to elaborate an entirely autonomous system of international jurisdiction.

26 Certain civil law jurisdictions, however, have specifically legislated in the field of international jurisdiction. Examples include Egypt[72] and Japan,[73] which have adopted a series of specific provisions in their codes of civil procedure defining the international jurisdiction of the courts of the forum, and Switzerland,[74] Tunisia[75] and Venezuela[76] which adopted a specific statute or code on private international law regulating, inter alia, the international jurisdiction of the forum. These rules which were specifically adopted for international disputes still follow a model based on rigid rules of jurisdiction relying

[67] One exception is the discretion granted by the rules on parallel litigation to courts to take into account the fact that a foreign court was seized first. This discretion is found in the rules on *lis pendens* with third States provided by the Brussels Ibis Regulation: cf G van Calster, 'Lis Pendens and third states: the origin, DNA and early case-law on Articles 33 and 34 of the Brussels Ia Regulation and its "forum non conveniens-light" rules' (2023) 19 Journal of Private International Law, 363.

[68] *Scheffel*, Case Bull. Civ I, no 452 (Cour de cassation, France), Judgment 30 October 1962.

[69] R Michaels, (n 12) para 1041.

[70] Although rules of domestic jurisdiction typically allocate jurisdiction between the courts of the relevant state, it was immediately perceived that they could have the same purpose if used in an international context. Despite being inspired from domestic rules, rules of international jurisdiction were designed to operate unilaterally, by solely defining the jurisdiction of the courts of the forum. Where the connecting factors of the forum would point to foreign countries, the forum would simply decline jurisdiction, but would not even suggest that a particular foreign court should retain the dispute.

[71] For a critique, cf P Mayer, V Heuzé and B Remy, *Droit international privé* (12th ed, LGDJ 2019) para 296.

[72] Code of Civil and Commercial Procedures (Egypt), Art 28 ff.

[73] Code of Civil Procedure 1996 (Japan), Art 3-2 ff. Cf K Takahashi, *Japan's New Act on International Jurisdiction* (Smashwords 2011); K Takahashi, 'The Jurisdiction of Japanese Courts in a Comparative Context' (2015) 11 Journal of Private International Law 103.

[74] Swiss Federal Act of Private International Law of 18 December 1987.

[75] Code of Private International Law of 27 November 1998 (Tunisia).

[76] Venezuelan Act on Private International Law of 6 August 1998.

predefined geographical connecting factors. This shows that the civil law paradigm will also be followed by lawmakers who specifically legislate in this field and suggests that there might be some fundamental reasons for sticking to such rules, such as the belief in the superiority of simple and predictable rules and the unwillingness to grant discretion to courts.[77]

27 When the Member States of the European Union initiated the process of harmonizing their rules of international jurisdiction in the 1960s, all of them belong to the civil law tradition. It was thus only natural to also adopt similar rules, and so they did in the predecessor of the Brussels Ibis Regulation, the 1968 Brussels Convention. It must be underscored, however, that, in the context of a federal project such as the European Union, the distinction between domestic and international litigation was also less acute, and thus less problematic. This is because the political project of the EU was precisely to make the courts of the Member States essentially fungible[78] and to exclude any assessment of the comparative merits of the judicial processes in the Member States.[79]

28 In addition to the domestic rules of jurisdiction, there were also some rare rules specifically designed for international disputes, such as Article 14 and 15 of the French Civil Code (nationality-based jurisdiction) and § 23 of the German Code of Civil Procedure (property-based jurisdiction). These rules, however, are either exorbitant rules aimed at protecting local parties,[80] or the remains of times when jurisdiction was conceived entirely differently.[81]

2.2 Doctrines Assessing the Overall Appropriateness of Jurisdiction

29 In the common law tradition, jurisdictional doctrines are more complex and incorporate, in addition to an analysis of the geographical proximity of the dispute with the forum, an overall analysis of the appropriateness of exercising jurisdiction in the particular case. This analysis can be conducted at various procedural stages.

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[77] Exceptions are rare. They include Japan and China, which have adopted innovative doctrines granting discretion to their courts in the application of their jurisdictional rules in international disputes. In Japan, cf Art 3-9 of the Code of Civil Procedure on 'Dismissal of Action under Special Circumstances', which allows Japanese courts to assess the overall fairness and efficiency of the taking of jurisdiction. In China, cf Art 532 of the Interpretation of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China of 3 May 2015, which introduces a form of *forum non conveniens*. Cf also Dominican Republic Private International Law Act of 5 December 2014, Art 23.

[78] Cf Introduction to the present Chapter.

[79] For instance, arguing the justice was too slow in Italy: cf *Eric Gasser Gmbh v MISAT srl*, (n 9) and (n 143).

[80] Cf 4.3.6

[81] Article 14 and 15 of the French Civil Code were established at a time where French courts would decline jurisdiction over suits involving only non-nationals. They were thus the only grounds of jurisdiction at the time. They reveal that jurisdiction was once conceived in relational terms, as the consequence of the bond between the ruler and its subjects: A.T von Merhen, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983) 63 *Boston University Law Review* 279.

2.2.1 England

30 A first model is the traditional English model, which is also followed in a number of common law jurisdictions (Singapore, Nigeria). Under the traditional English model, jurisdiction is based on the act of service of the defendant, which should naturally and normally take place within the jurisdiction of the English court. If such service can be made, jurisdiction is as of right, and there is no requirement of assessing the appropriateness of England as a forum. In contrast, if the defendant cannot be served within the jurisdiction, jurisdiction is considered as a privilege that a judge should allow.[82] This is why the claimant needs to obtain a leave to serve out of the jurisdiction, and why he should, for this purpose, establish not only that a particular connection between England and the dispute exists,[83] but also that England is the most appropriate forum to decide the dispute (*forum conveniens*)[84] and that there is a serious issue to be tried on the merits.85 The burden of proof of the appropriateness of the forum is thus on the claimant.

31 Whether the English court retained jurisdiction over the defendant as of right (on the basis of service within the jurisdiction) or after allowing service outside of the jurisdiction, the defendant may seek to stay the proceedings on the ground that a foreign court is a clearly more appropriate forum to decide the dispute, and that England is thus *forum non conveniens*. As the test for assessing the appropriateness of the English mirrors the test for assessing whether England is *forum conveniens* in the context of seeking leave to serve out of the jurisdiction (supra), the plea of *forum non conveniens* primarily serves the purpose of mitigating the exorbitance of the rule granting jurisdiction on the sole basis of service and thus ultimately presence with the jurisdiction.

32 While many commonwealth countries still follow the English model, others such as Australia and New Zealand have developed a different model. The only requirement for establishing jurisdiction is that a particular connection between the forum and the dispute exists. If this is the case, the claimant may serve the defendant without leave of the court, but the defendant may apply for a stay of the proceedings on the ground that the court is not the most appropriate forum to decide the dispute (*forum non conveniens*). The global assessment of the appropriateness of the jurisdiction of the court will thus only be made if the defendant raises a plea of *forum non conveniens*.

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[82] *Johnson v Taylor Brothers and Co Ltd*., Case All E.R. Rep. Ext. 1210 (House of Lords, UK) Judgment 11 November 1919 [1918–1919].

[83] Practice Direction 6B Service Out of the Jurisdiction (UK), 8 June 2023.

[84] *Spiliada Maritime Corpn v Cansulex Ltd*, (n 63).

[85] *AK Investment CJSC v Kyrgyz Mobil Tel Ltd & Ors (Isle of Man),* Case JCPC 2009/0064 (Supreme Court, UK), Judgment 10 March 2011 [201]1 UKPC 7.

2.2.2 Canada

33 After the Supreme Court of Canada revolutionized the Canadian law of enforcement of foreign judgments by introducing a new indirect jurisdictional rule insisting on the exercise of 'appropriate jurisdiction' by the court of origin, [86] this eventually had a transformative effect on the law governing international jurisdiction in the common law provinces. In 1994, the Uniform Law Conference of Canada (an intergovernmental body charged with proposing uniform law, typically related to treaty implementation) put forward a uniform model statute on 'territorial jurisdiction' that would reflect the newly 'constitutionalized' context put forward by the Supreme Court. The Court Jurisdiction and Proceedings Transfer Act ('CJPTA') was subsequently adopted in three provinces, including British Columbia in 2003, establishing a statutory basis for court jurisdiction in international (and interprovincial) litigation. The statute included the most common bases of residence of the defendant, consent and connections to the underlying action (contract, tort, property, etc), maintained the *forum non conveniens* discretion and introduced *forum necessitatis*. In the other provinces that did not adopt the CJPTA, notably Ontario, jurisdiction over foreign defendants continued to be established through service, either in the province based on presence, or outside the province based on a list of pre-set objective subject-matter connections. By the 2000s, however, foreign defendants began challenging jurisdiction on the basis that plaintiffs had seized a court without a 'real and substantial connection' to the action, arguing that this was an 'unconstitutional' assertion of jurisdiction. This led to some amendments to service rules to eliminate the ones that appeared inconsistent with the new 'real and substantial connection' test.[87] Finally, in 2012, the Supreme Court held that international jurisdiction was not established by service of process and instead developed a new approach based on 'presumptive connecting factors' meant to make concrete the abstract 'real and substantial connection' criterion.[88] While the Court considered the CJPTA and the Quebec Civil Code rules, it did not replicate them. Moreover, it repeatedly stated that it was not taking a position on the validity of a *forum necessitatis* rule at common law. As a result of these developments over the past thirty years, there are currently three regimes for international jurisdiction in Canada: the CCQ in Quebec, the CJPTA in three provinces and the common law, as set out by the Supreme Court, in the other provinces. While there is significant overlap between these regimes, and common constraints on future developments given the constitutional limitations imposed by the Supreme Court, there are distinctions between the regimes. These include, for eg, whether *forum necessitatis* is recognized, the

[86] *Morguard Investments Ltd. c. De Savoye*, Case 21116 (Supreme Court, Canada), Judgment 20 December 1990; *Beals c. Saldanha*, Case 2003 CSC 72 (Supreme Court, Canada), Judgment 18 December 2003: cf Part 14.

[87] This included the rule allowing service outside Ontario on a 'necessary party' and in relation to a claim for 'damages suffered in Ontario' for a tort wherever committed.

[88] *Club Resorts Ltd. v Van Breda*, Case 2012 SCC 17 (Supreme Court, Canada), Judgment 18 April 2012. It also maintained the two 'traditional' bases of presence of the defendant and consent.

treatment of forum selection clauses,[89] the sufficiency of mere presence of the defendant,[90] and the connections for contract and tort actions.[91] This diversity may not be expected by foreign parties engaging in cross-border activity with a Canadian party or by their foreign lawyers planning dispute resolution clauses, wishing to initiate or respond to litigation in Canada or against a Canadian party.

2.2.3 United States

34 The foundational assumption in the United States is that jurisdiction should be based on certain minimum contacts between the defendant and the forum. This is the result of the constitutional guarantee afforded by the Fifth and Fourteenth amendments to the US Constitution (also known as the Due Process Clause)[92] which applies both in federal and state courts in the United States.[93] On the basis of this guarantee, the US Supreme Court has identified two categories of personal jurisdiction.[94] The first category is concerned with cases in which the in--state activities of the defendant 'ha[d] not only been continuous and systematic, but also gave rise to the liabilities sued on'. Adjudicatory authority of this order, in which the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum,'[95] is labelled 'specific jurisdiction'. On the other hand, 'court may assert general jurisdiction over foreign (sister – state or foreign – country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic'[96] as to render them essentially at home in the forum State.

35 The determination of due process is focused on an unweighted balancing test that looks at specific facts as to the defendant's purposeful contacts with the forum (and if those

[89] All provinces except Quebec continue to admit a court's discretion to disregard a forum selection clause where there is 'strong cause' to do so, following the English approach.

[90] The CJPTA does not recognize jurisdiction based on the mere presence of the defendant, having instead adopted residence as the connecting factor.

[91] For eg, Quebec's jurisdiction in contract cases is arguably broader given that it can be based on 'injury suffered in Quebec', which has benefited local plaintiffs.

[92] Cf 1.2.

[93] In principle, the international jurisdiction of courts in the United States, which is labelled 'personal jurisdiction', is a matter of state law (including for federal courts, which apply the rules of personal jurisdiction of the state in which they sit: FED R. CIVP. 1938 4(k)(1)), subject to the constitutional guarantee afforded by the US Constitution. Many states have adopted specific legislation to that effect (called 'long arm statutes'), but they are typically vague and open-ended. As a result, the international jurisdiction of US courts is essentially defined by the constitutional guarantee: cf S Dodson, 'Personal Jurisdiction in Comparative Context' (2020) 68 The American Journal of Comparative Law, 701.

[94] Which were initially suggested by AT von Mehren and D Trautman, 'Jurisdiction to Adjudicate: A Suggested Analysis' (1966) Harvard Law Review 79, 1121, 1144–1163. Two additional categories are jurisdiction based on the consent of the defendant (whether by entering into an ex ante agreement - cf, 4.3.3- or by waiver or forfeiture) and jurisdiction based on service within the jurisdiction, that the US Supreme Court has insulated from the minimum contacts test (cf 1.2): Dodson, (n 91).

[95] *Helicopteros Nacionales de Colombia, S.A. v Hall*, No 82-1127 (Supreme Court, US) [466 US 408 (1984)] Judgment 24 April 1984, 414, (n 8).

[96] *Helicopteros*, para 414, (n 9); *Goodyear Dunlop Tires Operations, S.A. v Brown*, No 10-76 (Supreme Court, US) [564 US 915 (2011)] Judgment 27 June 2011, 919; *International Shoe v Wash,* (n 48).

contacts arise out of, or relate to, the litigation with respect to 'specific jurisdiction') and the reasonableness of the forum asserting jurisdiction over the defendant. In general, when the basis for jurisdiction in federal court is diversity of citizenship (e.g., New York party and Luxembourg party), the measuring unit for the contacts is the state in which the federal court is based, rather than aggregating national contacts. Similarly, when a suit is in state court, the measuring unit would be state boundaries. As a result, there has been more pressure to expand the scope of the measuring for specific jurisdiction and for aggregating national contacts. This was done by Congress but only in connection with federal question jurisdiction in 1993 by amending F.R.Civ.P 4(k)(2).[97]

36 Since the cases are fact specific, one finds trends within certain courts and certain periods in applying the multi-factor test. The first significant treatment of a foreign defendant[98] during this time concerning personal jurisdiction is in *Asahi*,[99] where in 1987 the Supreme Court specifically considered the foreignness of the defendant and the litigation, ultimately holding that assertion of jurisdiction by the California state court would be unreasonable and therefore unconstitutional.[100] The Court did not address jurisdiction involving a foreign defendant again until 2011, when it addressed both specific jurisdiction[101] and general jurisdiction.[102] Both cases showed narrowing of jurisdiction but the tests for specific jurisdiction in *Nicastro* and general jurisdiction in *Goodyear* and *Daimler* did not differentiate between domestic defendants and aliens. An empirical

[97] This was done in part in response to *Omni Capital Int'l v Rudolf Wolff & Co., Ltd*., No 86-740 (Supreme Court, US) [484 US 97 (1987)], Judgment 8 December 1987. A recent article, W S Dodge and S Dodson, 'Personal Jurisdiction and Aliens', (2018) 116 Michigan Law Review, 1205. considers the increasing prevalence of noncitizens in US civil litigation and how the alienage status of a defendant should affect personal jurisdiction. The authors propose a new theory of personal jurisdiction over aliens. Under this theory, alienage status broadens the geographic range for minimum contacts from a single state to the whole nation. This national-contacts test applies to personal jurisdiction over an alien defendant whether the cause of action arises under federal or state law and whether the case is heard in federal or state court. They argue the test would be consistent with the Constitution and consonant with the practical realities of modern transnational litigation.

[98] *Piper Aircraft Co. v Reyno*, (n 64) and (n 107) is forum non which is a discretionary issue; *Helicopteros Nacionales de Colom. v Hall*, (n 95) had no emphasis on the foreign defendant. Of course, the fountainhead of much of the doctrine of comity and of recognition of foreign judgments came a century before in *Hilton v Guyot*, No 130, 34 (Supreme Court, US) [159 US 113 (1895)], Judgment 3 June 1895.

[99] *Asahi Metal Indus. Co. v Superior Court of Cal.* (n 49).

[100] *Asahi* had a unanimous decision to find that California could not exercise jurisdiction over the Asahi company but a plurality opinion and a split among two groups of Justices as to *why*. Four justices found that there were insufficient minimum contacts with the forum, but eight Justices found assertion of jurisdiction would be unfair.

[101] *J. McIntyre Mach., Ltd. V Nicastro*, No 09-1343 (Supreme Court, US) [564 US 873 (2011)], Judgment 27 June 2011; *Daimler AG v Bauman*, No 11-965 (Supreme Court, US) [571 US 117 (2014)], 14 January 2014).

[102] *Goodyear Dunlop Tires Operations, S.A. v Brown*, (n 96).

study[103] confirmed what many had sensed that the 'reasonableness' portion of the minimum contacts/fairness test was used primarily with foreign defendants. The article argues, based on empirical data of over 400 cases and their outcomes, that although the analysis is meant to be the same for both types of defendants, in reality there is a big difference--only foreign defendant cases are dismissed for lack of reasonableness. 'Whether the defendant is domestic or foreign, the courts first look to determine whether minimum contacts are satisfied, and then turn to the "reasonableness" of exercising specific jurisdiction. However, courts' analyses vary dramatically from that point on, depending on whether the party resisting the exercise of jurisdiction is domestic or foreign.'[104]

37 Defendants may also seek to dismiss the proceedings on the ground of *forum non conveniens*.[105] They bear the burden of showing first that there is an adequate alternative forum. The foreign forum should thus have jurisdiction over the dispute and be adequate for providing the plaintiff with a sufficient remedy for his wrong. Secondly, the balance of private and public interest factors should favor dismissal.[106] Contrary to the English doctrine of *forum non conveniens*, while there is a strong presumption in favor of plaintiff's choice of forum, 'a foreign plaintiff's choice deserves less deference.'[107]

3 VARIETY OF JURISDICTIONAL RULES AND POLICIES UNDERPINNING THEM

38 Several values or interests underpin the design of jurisdictional rules. Some principles such as proximity, legal certainty (foreseeability), party autonomy (through forum selection clauses), the protection of the weaker party, the protection of the domestic party or of a domestic interest or policy appear to be common to many jurisdictions. However, they do not necessarily interact in the same way, nor are accorded the same relevance in all of them.

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[103] L J Silberman and N D Yaffe, 'The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third of Conflict of Laws—Judicial Jurisdiction Over Foreign Defendants and Party Autonomy in International Contracts' (2017) Duke Journal of Comparative and International Law 27, L. 405. This article discusses the due process standard for specific jurisdiction vis a vis foreign versus domestic defendants. The authors discovered a split within cases with foreign defendants--finding that tort cases, like personal injury claims against foreign manufacturers, were not generally dismissed on reasonableness grounds--yet other cases, like for breach of contract or fraud, often were. These cases were dismissed, according to the authors, primarily based on comity concerns, determined by *Asahi* to be part of the reasonableness prong of the personal jurisdiction analysis. These types of concerns apply only to foreign defendants, not to domestic defendants. The authors discuss a variety of factors considered in the reasonableness analysis unique to foreign defendants, such as whether the defendant can obtain local counsel, the hardship on US plaintiffs if the case is dismissed, etc.

[104] Silberman and N D Yaffe (n 103) 407.

[105] The doctrine of *forum non conveniens* can be applied differently in federal and state courts: cf W S Dodge, M Gardner and C Whytock., 'The Many State Doctrines of Forum Non Conveniens' (2023) 72 *Duke Law Journal* 1163-1256.

[106] Cf 2.

[107] *Piper Aircraft Co. v Reyno* (n 64) (n 98).

3.1 Sovereignty

39 A first policy underpinning jurisdictional rules is the protection of state sovereignty.[108] Certain disputes have traditionally been considered as involving crucial state interests, and thus as justifying the establishment of rules of exclusive jurisdiction. Rules of exclusive jurisdiction not only grant jurisdiction to the forum state without any additional requirement, but also forbid the recognition of foreign judgments perceived as infringing such jurisdiction.[109]

40 The two most widely shared examples are disputes involving immoveable property and disputes relating to the validity of entries into public registries. Immoveable property has traditionally been considered as critical for state sovereignty and thus to fall within the exclusive jurisdiction of the courts of the situs of the immoveable.[110] The rationale is possibly the exclusive jurisdiction of states under public international law over their territory, but the 'land taboo' is not universally shared.[111] Jurisdiction over public registers establishing companies or intellectual property rights is equally considered to be exclusive.[112] Public registries are state entities that were established by a given state, and can thus only be governed by the law of that State. Any intervention of a foreign state in the operation of such a registry would be considered as an interference in the organization of the forum state and a violation of the exclusive jurisdiction of state to organize themselves under public international law.

41 Other examples include cases where a given state has found that its law should be mandatorily applied to preserve certain crucial interests. The protection of these interests may then be strengthened by establishing not only that the rule should be applied irrespective of the otherwise applicable law, but also a rule of exclusive jurisdiction ensuring the application of the law of the forum.[113]

42 A debated issue is whether international mandatory rules of the forum should be an exception to the enforcement of choice of court agreements granting jurisdiction to foreign courts.[114] The traditional view is that issues of jurisdiction and issues of applicable law should be conceptually distinguished, and that jurisdiction should be determined on

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[108] L Usunier, (n 3)

[109] See, eg, Brussels Ibis Regulation, Art 45.

[110] Brussels Ibis Regulation, Art 24(1); *British South Africa Co v Companhia de Mocambique,* Case A.C. 602 (House of Lords, UK), Judgment 8 September 1893; *Shaffer v Heitner,* (n 50); Tunisian Code of Private International Law, Art 8.

[111] It is not in Japan, where it does not appear on the list of exclusive heads of jurisdiction of Art 3-5 of the Japanese Code of Civil Procedure.

[112] Brussels Ibis Regulation, Art 24(2) and (3); Japanese Code of Civil Procedure, Art 3-5

[113] Cf eg, Civil Code 1991 (Quebec), Art 3151 (tort action for damage caused by exposure to or use of raw materials originating in Québec).

[114] The issue is the enforcement of choice of court clauses provided in contracts involving weaker parties is specific and addressed below 3.3.

the basis of specific concerns.[115] The protection of the most crucial interests of the forum should be protected by denying enforcement to foreign judgments failing to take them into account through the public exception policy. The EU law of jurisdiction does not provide for any exception to the enforcement of choice of court agreements on the ground that an overriding or internationally mandatory provision of the forum might apply.[116] The French Supreme Court for private and criminal matters has ruled repeatedly that the existence and applicability of a French international mandatory rule was no ground for denying enforcement to a choice of court agreement granting jurisdiction to a foreign court.[117] The US Supreme Court has also ruled that, except in cases involving consumers, choice of court agreements should not be denied enforcement on the ground of public policy where stipulated in international commercial contracts.[118] However, the view that it would be appropriate to make an exception to the enforcement of choice of court agreements has gained traction in recent years. The German Federal Court of Justice has ruled that the applicability of a German mandatory rule based on EU legislation declared internationally mandatory by the CJEU could justify retaining jurisdiction over a dispute despite the existence of a choice of court agreement providing jurisdiction to a foreign court.[119] The Hague Convention on Choice of Court Agreement of 30 June 2005 provides that the court of a contracting State other than the court chosen in the choice of court agreement is not compelled to dismiss the proceedings and may thus retain jurisdiction 'if giving effect to the agreement […] would be manifestly contrary to the public policy of the [non chosen court seized of the proceedings]',[120] which offers a ground to deny enforcement to a choice of court agreement to ensure the application of international mandatory rules of the forum.[121]

3.2 Geographical Proximity

43 Most jurisdictional rules incorporate to some degree an analysis of the geographical proximity between the dispute and the forum. In civil law jurisdictions, this is the exclusive foundation of most rules. The rationale is that rules based on a close connection between the court and the action facilitate the sound administration of justice, as it facilitates the taking of the evidence, and ensures legal certainty by allowing defendants to foresee where they can be sued.[122] Geographical proximity is also the starting point of the analysis

[115] Cf 3.5.

[116] Brussels Ibis Regulation, Art 25; 2007 Lugano Convention, Art 23.

[117] *Monster Cable Products Inc v Audio Marketing Services*, Case no 07--15.823 (Cour de cassation, France), Judgment 22 October 2008.

[118] *M/S Bremen v Zapata Off--Shore Co.*, No. 71-322 (Supreme Court, US) [407 US 1 (1972)], Judgment 12 June 1972, distinguishing *Bisso v Inland Waterways Corp*., No 50 (Supreme Court, US) [349 US 85 (1955)], Judgment 16 May 1955.

[119] Case no VII ZR 25/12 (BGH, Germany), Judgment 5 September 2012.

[120] Hague Convention on Choice of Court Agreements, Art 6(c).

[121] T Hartley and M Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention* (2013) para 153.

[122] Cf eg, Preamble to the Brussels Ibis Regulation, Recital 16.

under more complex jurisdictional rules, where the existence of a geographical connection between the dispute and the court is a mere gateway which triggers an overall analysis of the appropriateness of exercising jurisdiction in the particular case.[123]

44 The determination of geographical proximity will result in the establishment of jurisdictional rules distinguishing between different areas of the law. Typical rules include granting jurisdiction to the courts of the place of performance of certain obligations of the contract in contractual matters,[124] to the courts of the place of the event giving rise to the damage or the place of the damage in tort matters,[125] to the courts of the place of the location of the property in property matters,[126] to the courts of the place where the last domicile of the deceased in succession matters,[127] to the courts of the place of the residence of the spouses in matrimonial property matters[128] or to the place of the residence of the child in parental responsibility matters.[129]

45 A connecting factor deserving specific attention is the domicile/residence of each of the parties. In many legal traditions, the court of the domicile of the defendant is considered to be a natural forum. As a consequence, its jurisdiction is general, in so far as it is available for entertaining all actions against the defendant (except those falling within the exclusive jurisdiction of a foreign court).[130] In contrast, granting jurisdiction to the courts of the domicile of the plaintiff is considered to be exorbitant (*forum actoris*), unless it benefits weaker parties.[131]

3.3 Party Autonomy

46 As States define largely unconstrained[132] the jurisdiction of their courts, and international disputes are by definition connected to several legal orders, it is common that the courts of several countries could retain jurisdiction over any particular international dispute. The

[123] *Supra*, 2.

[124] Brussels Ibis Regulation, Art 7(1); Japanese Code of civil procedure, Art 3-3(i); Tunisian Code of Private International Law, Art 5.

[125] Brussels Ibis Regulation, Art 7(2); Tunisian Code of Private International Law, Art 5. The jurisdiction of the court of the place of damage is often only admitted reluctantly, under certain qualifications: see, e.g., Japanese Code of civil procedure, Art 3-3(viii): damage suffered in the forum should be foreseeable.

[126] Japanese Code of civil procedure, Art 3-3(iii).

[127] Succession Regulation, Art 4; Japanese Code of civil procedure, Art 3-3(xii).

[128] Council Regulation implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, 2016/1103 of 24 June 2016 (EU), Art 6.

[129] Brussels IIter Regulation, Art 7. Tunisian Code of Private International Law, Art 6.

[130] In the civil law tradition, the domicile of the defendant is the default jurisdictional rule (see eg Brussels Ibis Regulation, Art 4; Japanese Code of civil procedure, Art 3-2; Tunisian Code of Private International Law, Art 3). In the USA, it grants general jurisdiction under the Due Process jurisprudence of the US Supreme Court: cf *International Shoe Co. v Washington*, (n 48) and (n 96).

[131] Cf 3.4.

[132] Cf 1.1.

resulting uncertainty has been the driving force behind the gradual recognition of the validity and usefulness of forum selection clauses. Their legal regime and acceptability might become truly global if the Hague Convention on Choice of Court Agreements of 30 June 2005 is widely ratified in the future.

47 The acceptance and promotion of choice of court agreements has first resulted in a liberalization of the conditions of formal validity of such clauses. Under the laws of certain States, it is required that they be stipulated in 'very apparent characters'.[133] The most recent instruments regulating choice of court agreements, however, have abandoned such special formal requirements. While many States still maintain the requirement that choice of court agreements be in writing[134] (including by electronic means),[135] the EU law of jurisdiction and the 2005 Hague Convention on Choice of Court Agreements have accepted that such agreements could be valid if merely evidenced or documented in writing,[136] or are in a form which accords with the prior practices of the parties or international usage.[137]

48 As the formal requirements become less stringent, the issue of the ascertainment of the consent of the parties becomes more acute. It typically arises in the context of the battle of forms including choice of court agreements, or of the extension of such agreements to parties who were not initially signatories. As European and international instruments do not address expressly the issue of consent, one view is that it should be left to the applicable law, but States would designate different laws to govern the issue.[138] An alternate view developed by the CJEU is that the purpose of the formal requirements laid down by the applicable (European) instrument is to ensure and to prove that consent existed.[139] Consent to choice of court agreements also arises where parties with superior bargaining power might impose the jurisdiction of courts unfavourable to the other

[133] Cf, eg, Art 48 of the French Code of Civil Procedure.

[134] Japanese Code of Civil Procedure, Art 3-7(2); Chinese Law of Civil Procedure, Art 34.

[135] Japanese Code of Civil Procedure, Art 3-7(3); Brussels Ibis Regulation, Art 25(2); 2005 Hague Convention, Art 3(c)(ii).

[136] Brussels Ibis Regulation, Art 25(1)(a); 2007 Lugano Regulation, Art 23(1)(a); 2005 Hague Convention, Art 3(c)(i).

[137] Brussels Ibis Regulation, Art 25(1)(b) & (c); 2007 Lugano Regulation, Art 23(1)(b) & (c).

[138] One first view is that the law governing substantive validity of choice of court agreements should apply, which would often point to the law of the chosen court (Brussels Ibis Regulation, Art 25(1); 2005 Hague Convention, Art 6(a)). In the US, the traditional view is that the law of the forum applies: cf *Fendi S.R.L v Condotti Shops, Inc.*, No. 3D99-2258 (District Court of Appeal of Florida, Third District) [754 So. 2d 755 (Fla. Dist. Ct. App. 2000)], Judgment 8 March 2000.

[139] *Saey Home & Garden NV/SA v Lusavouga-Máquinas e Acessórios Industriais SA*, Case C-64/17 (CJEU), Judgment 8 March 2019 [ECLI: ECLI:EU:C:2018:173] para 25. The consequence of this line of authorities is that the CJEU considers that the issue of the existence of consent should be defined at European level: for instance, choice of court agreements should only be considered as accepted where the text of the contract signed by both parties itself contains an express reference to general conditions which include a jurisdiction clause (*Hőszig Kft. v Alstom Power Thermal Services*, Case C-222/15 (CJEU), Judgment 7 July 2016 [ECLI:EU:C:2016:525] para 39).

party,[140] or to avoid the application of mandatory provisions of the courts of origin of one or both parties.[141]

49 The fact that choice of court agreements are in most cases contractual clauses stipulated in contracts also raises the issue of the effect of the nullity of the main contract on the enforceability of the choice of court clause. The most recent instruments consistently address the issue by providing for the independence of the choice of court clause from the main contract, and thus its enforceability irrespective of whether one party might claim that the main contract should be set aside.[142]

50 The enforceability of choice of court agreements can also be jeopardized by initiating parallel proceedings in courts other than the chosen court which might either rule that the choice of court agreement is invalid or prevent the resolution of the dispute in the chosen court under the rules governing parallel litigation.[143] In order to enhance the efficacy of choice of court agreements, certain instruments have introduced new mechanisms giving priority to the chosen court in case of parallel litigation initiated in another forum, irrespective of the dates of such proceedings.[144] In the common law tradition, the protection of the jurisdiction chosen by the parties is a traditional ground for issuing injunctions enjoining parties who initiated proceedings in a foreign court in violation of a choice of court agreement to withdraw such proceedings on penalty of being held in contempt of court.[145]

3.4 Protection of Weaker Parties

51 The operation of the most traditional jurisdictional rules can be perceived as putting certain categories of defendants at a severe disadvantage and potentially preventing them from having a genuine possibility to access a competent court. In order to protect their right to access to court, it is possible to apply the common doctrines of contract law offering remedies to parties who had not genuinely consented to a given clause.[146] Alternatively, traditional rules of jurisdiction can be amended in various ways. A first

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[140] Cf 3.3.

[141] Cf 3.1.

[142] Brussels Ibis Regulation, Art 25(5); 2005 Hague Convention, Art 3(d).

[143] This was the case in the European Union until 2012, as the CJEU had ruled that the *lis pendens* doctrine applied in presence of choice of court agreements and thus prevented the chosen court from deciding the dispute as long as the court seized first would not have declined jurisdiction: *Gasser Gmbh v MISAT srl*, (n 9) and (n 79).

[144] Brussels Ibis Regulation, Art 31(2).

[145] In the UK, cf *Star Reefers Pool Inc. v JFC Group Co. Ltd*, Case [2012] EWCA Civ 14 (Court of Appeal, England and Wales) Judgment 20 January 2012. Other sanctions such as granting damages for breach of the jurisdiction clause are conceivable: cf A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008); K Takahashi, 'Damages for Breach of a Choice-of-Court Agreement' (2008) Yearbook Private International Law, 57.

[146] This is the case in the US: see *Carnival Cruise Lines, Inc. v Shute*, No. 89-1647 (Supreme Court, US) [499 US 585 (1991)] Judgment 17 April 1991.

strategy is to prohibit, or severely limit, the enforceability of forum selection clauses included in contracts involving such parties.[147] A second strategy is to offer them the possibility to sue in their home court. Given the exorbitance of such a rule, it is reserved to the most extreme case scenarios, such as passive consumers approached by foreign professionals who directed their activity towards the state of residence of the consumers.[148]

3.5 Applicability of the Law of the Forum

52 Although the issues of jurisdiction and choice of law are regarded as conceptually distinct,[149] the potential application of the law of the forum, even when its rules are not considered as protecting the most crucial interests of the forum and thus as mandatory internationally,[150] can play an important role in the determination of the international jurisdiction of courts.

53 First, it is widely admitted that the application of its own law by a court reduces the costs of the trial and the risks of errors in the determination of the applicable rule. This is the main reason why the applicability of foreign law is regarded as a factor weighing in favour of staying proceedings in favour of a foreign court in the *forum non conveniens* analysis.[151] However, lawmakers in the civil law world may also design rules of jurisdiction with the idea of favouring the application by the forum of its own law.[152] Such rules can reveal various trends in modern private international law[153] such as the specialization of rules of choice of law and rules of jurisdiction, the willingness to combine their use to achieve

[147] Brussels Ibis Regulation, Art 15, 19, and 23; Japanese Code of civil procedure, Art 3-7. The jurisprudence of US courts is less rigid. It does not protect certain categories of parties per se, but it assesses whether the designated court is 'suitable,' 'available,' and able to 'accomplish substantial justice.' *M/S The Bremen v Zapata Off–Shore Co* (n 118) and and Dodson (n 92).

[148] Brussels Ibis Regulation, Art 18.

[149] H Batiffol, 'Observations sur les liens de la compétence judiciaire et de la compétence législative', (1962) 9 Netherlands International Law Review, Special Issue: De Conflictu Legum, Essays Presented to RD Kollewijn and J Offerhaus, 55.

[150] Cf 3.1.

[151] Cf 2. Under the US doctrine of *forum non conveniens*, the applicability of foreign law is also a public factor in favour of dismissing the action, as the foreign court might take the opportunity of the case to develop the law: cf, eg,, the call of the US court for India to develop its environmental law in the Bhopal case: *In Re Union Carbide Corp. Gas Plant Disaster*, No 21-38 (Supreme Court, US) [634 F. Supp. 842 (1986)] Judgment 10 June 1986.

[152] Cf, eg, Recital 27 of the Preamble to the EU Succession Regulation ('The rules of this Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law.'); 1998 Venezuelan Act of Private International Law, Art 41 and 42.

[153] S Corneloup, 'Les liens entre *forum* et *ius*: réflexion sur quelques tendances en droit international privé contemporain', *Mélanges en l'honneur de B. Ancel* (Ipralex 2017) 461.

certain substantive goals[154] and, in federal systems, the political statement of the equivalence of the laws of the various units of the systems.

54 Beyond the efficiency of promoting the application by courts of their own law, the choice of the law of a given State to govern an international contract is also a promise of future business for its legal profession. This business can be increased by ensuring that this choice of law also results in the jurisdiction of the courts of the same State (in the rare case scenario where the parties will not have provided in their contract for the application of the law and the jurisdiction of the courts of the same State). Under English law, a specific ground allowing service outside of the jurisdiction[155] and thus potentially the jurisdiction of English courts is that 'A claim is made in respect of a contract where the contract – is governed by English law',[156] which is unsurprising given the dominance of English law in the international markets for contracts[157] and the openness of English courts to entertain disputes unrelated to England.[158]

3.6 Protection of Local Parties

55 Finally, a number of jurisdictional rules which were often crafted under outdated jurisdictional theories, and which are typically regarded as exorbitant under modern fairness theories,[159] have nevertheless been kept in force to offer a default forum to nationals and residents. The clearest example is nationality based jurisdiction, which allows nationals to sue in the courts of their home state for disputes otherwise unrelated to that jurisdiction.[160] The modern justification for such jurisdictional rules is that the natural forum for the dispute might not be otherwise appropriate, and that forcing the local party to litigate in the foreign court would either amount to a denial of justice (because the local party would not be treated fairly) and incentivize that party to commit unlawful actions (by bribing a foreign court in a country where corruption would be endemic).

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[154] For instance, the protection of weaker parties by ensuring both the jurisdiction of the courts and the application of the law of the most favourable jurisdiction (eg, the country of the residence of consumers in the EU: cf Regulation (EC) No 593/2008 (Rome I), Art 6(1); Brussels Ibis Regulation, Art 18).

[155] Cf 2.2.1.

[156] Practice Direction 6B Service Out of the Jurisdiction, Ground 6(c).

[157] G Cuniberti, 'The International Market for Contracts – The Most Attractive Contract Laws' (2014) 34 *Northwestern Journal of International Law & Business* 455.

[158] Under the so-called open court theory: cf Lord Denning in *The Atlantic Star,* Case Q.B. 364, 382 (Court of Appeal, England and Wales), Judgment 27 July 1972 [1973] UKHL J0410-1: 'You may call this 'forum--shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.'

[159] Some of these rules were outlawed and rewritten on the ground that they did not comport with fundamental rights: cf 1.2.

[160] Cf, eg, Art 14 and 15 of the French and Luxembourg Civil Code 1803.

56 In common law jurisdictions, jurisdiction based on service within the jurisdiction could be considered as equally exorbitant, but the *forum non conveniens* doctrine precisely limits its scope to cases where the defendant is unable to demonstrate that the foreign court would be 'adequate' (under the US doctrine), or would be able do substantial justice (under the English doctrine), which would be the case if the foreign court would discriminate against the local plaintiff, or be corrupt.

57 States may also decide to keep exorbitant heads of jurisdiction to ensure that their own nationals are not denied the benefit of a rule which other States might grant to their own nationals,[161] or in order to retain a bargaining power enabling them to enter into negotiations with other States to exclude the application of such exorbitant rules in their mutual relationships, either through bilateral[162] or multilateral treaties.[163]

[161] Cf, eg, Case no 02--17974 (Court of Cassation, France), Judgment 30 March 2004, ruling in a divorce case between an American husband and a Franco--American wife: 'absent a treaty of judicial cooperation between the United States and France in civil matters, the favour benefiting [the wife] arising under the exclusive jurisdictional rule of Art 15 [of the Civil Code, ie, nationality based jurisdiction] was not more exorbitant than the one arising under the rule of Florida law granting jurisdiction on the ground of temporary presence of the plaintiff in that State'.

[162] French senior judges have publicly said that the reason the Court of cassation would dismiss challenges to nationality-based jurisdiction was that their existence was essential in the negotiation of bilateral treaties of judicial cooperation.

[163] One of the most significant achievements of the European law of jurisdiction was to exclude the application of exorbitant heads of jurisdiction in the mutual relationships between the Member States, while retaining them in their relationships with third States.

ABBREVIATIONS AND ACRONYMS

Art	Article/Articles
BGH	*Bundesgerichtshof* (Federal Court of Justice) [Germany]
CCQ	Civil Code Rules (Quebec)
cf	*confer* (compare)
CJEU	Court of Justice of the European Union
CJPTA	The Court Jurisdiction and Proceedings Transfer Act (Canada)
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
eg	*exempli gratia* (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
ff	following
GCCP	Code of Civil procedure (Germany)
HCCH	Hague Conference on Private International Law
ie	*id est* (that is)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
obs	Observations
para	paragraph/paragraphs
SCC	Supreme Court Canada
Sec	Section/Sections
UK	United Kingdom
UN	United Nations
US / USA	United States of America
USD	United States Dollar
v	Versus

LEGISLATION

International/Supranational

European Convention on State Immunity 1972.

Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1988.

Convention on Jurisdictional Immunities of States and Their Property 2004.

Hague Convention on Choice of Court Agreement 2005.

Regulation (EC) 593/2008 of 17 June 2008 of the European parliament and of the Council on the law applicable to contractual obligations (Rome I) (EU).

Regulation 1215/2012 of 12 December 2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (EU).

Regulation 650/2012 of 4 July 2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (EU).

Council Regulation implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, 2016/1103 of 24 June 2016 (EU).

Council Regulation 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (EU).

National

Civil Code 1803 (Luxembourg).

Civil Code 1804 (France).

Code of Civil Procedure 1887 (Germany).

Code of Civil and Commercial Procedures (1968) (Egypt).

FED. R. CIV.P. 1938.

US Foreign Sovereign Immunities Act 1976.

UK State Immunity Act 1978.

Swiss Federal Act of Private International Law of 18 December 1987.

Civil Code 1991 (Quebec).

Code of Civil Procedure 1996 (Japan).

Venezuelan Act on Private International Law of 6 August 1998.

Code of Private International Law of 27 November 1998 (Tunisia).

Dominican Republic Private International Law Act of 5 December 2014.

Interpretation of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China of 3rd May 2015.

Restatement (Fourth) of Foreign Relations Law 2018.

Practice Direction 6B Service Out of the Jurisdiction (UK) 2022.

CASES

International/Supranational

Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line, Case C-391/95 (CJEU), Judgment 17 November 1988 [ECLI:EU:C:1998:543].

Al- Adsani v Government of Kuwait (ECtHR), Case 35763/97, Judgment of 21 November 2001.

Eric Gasser Gmbh v MISAT srl, Case C-116/02 (CJEU), Judgment 9 December 2003 [ECLI:EU:C:2003:657].

Cudak v Lithuania, Case 15869/02 (ECtHR), Judgment 23 March 2010 para 66.

Sabeh El Leil v France, Case 34869/05 (ECtHR), Judgement 29 june 2011 para 54.

Germany v Italy; Greece intervening, Jurisdictional Immunities of the State (PICJ), Judgment 3 February 2012, [Reports 2012] 99.

A Mahamdia v People's Democratic Republic of Algeria, Case C-154/11 (CJEU), Judgment 19 July 2012 [ECLI: ECLI:EU:C:2012:309].

Oleynikov v Russia, Case 36703/04 (ECtHR), Judgment 14 March 2012 para 66.

Hőszig Kft. v Alstom Power Thermal Services, Case C-222/15 (CJEU), Judgment 7 July 2016 [ECLI:EU:C:2016:525] para 39.

Radunović v Montenegro (ECtHR), Case 45197/13, Judgment 25 October 2016 para 69.

Naït-Liman v Switzerland, Case 51357/07 (ECtHR) GC, Judgment 15 March 2018.

Saey Home & Garden NV/SA v Lusavouga-Máquinas e Acessórios Industriais SA, Case C-64/17 (CJEU), Judgment 8 March 2019 [ECLI: ECLI:EU:C:2018:173].

LG v Rina, Case C-641/18 (CJEU), Judgement 7 May 2020 [ECLI: ECLI:EU:C:2020:349].

LG v Rina, Case C-641/18 (CJEU), Judgment 7 May 2020 [ECLI:EU:C:2020:3], Opinion of A.G. M Szpunar) para 38.

Benkharbouche and Janah v UK, Case 19059/18 and 19725/18 (ECtHR), Judgment 5 April 2022.

National

British South Africa Co v Companhia de Mocambique, Case A.C. 602 (House of Lords, UK), Judgment 8 September 1893.

Hilton v Guyot, No 130, 34 (Supreme Court, US) [159 US 113 (1895)], Judgment 3 June 1895.

Johnson v Taylor Brothers and Co Ltd., Case All E.R. Rep. Ext. 1210 (House of Lords, UK), Judgment 11 November 1919 [1918–1919].

France v Turkey, Case No 9 (PCIJ), Judgment 7 September 1927 (ser. A) No. 10, ICGJ 248.

International Shoe Co. v Washington, No 107 (Supreme Court, US) [326 US 310 (1945)] Judgment 3 December 1945.

Bisso v Inland Waterways Corp., No 50 (Supreme Court, US) [349 US 85 (1955)], Judgment 16 May 1955.

Scheffel, Case Bull. Civ. I, no 452 (Cour de cassation, France), Judgment 30 October 1962.

Claim against the Empire of Iran Case, Case 45 ILR 57 (BVerfG, Germany), Judgment 30 April 1963.

Administration des chemins de fer du gouvernement iranien c/ Sté Levant Express Transport, Case 67-10.243 (Court of cassation, France), Judgment 25 February 1969.

M/S Bremen v Zapata Off--Shore Co., No. 71-322 (Supreme Court, US) [407 US 1 (1972)], Judgment 12 June 1972.

The Atlantic Star, Case Q.B. 364, 382 (Court of Appeal, England and Wales), Judgment 27 July 1972.

Shaffer v Heitner, No 75-1812 (Supreme Court, US) [433 US 186 (1977)] Judgment 24 June 1977.

Piper Aircraft Co. v Reyno, No 8048 (Supreme Court, US) [454 US 235 (1981)] Judgment 8 December 1981.

Playa Larga (Owners of Cargo Lately Laden on Board) v I Congreso del Partido (Owners), Case 1 AC 244 (House of Lords, UK), Judgment of 16 July 1981 [1981] UKHL J0716-2.

Helicopteros Nacionales de Colombia, S.A. v Hall, No 82-1127 (Supreme Court, US) [466 US 408 (1984)] Judgment 24 April 1984.

Spiliada Maritime Corpn v Cansulex Ltd, Case AC 460 (House of Lords, UK), Judgment 19 November 1986.

In Re Union Carbide Corp. Gas Plant Disaster, No 21-38 (Supreme Court, US) [634 F. Supp. 842 (1986)] Judgment 10 June 1986.

Asahi Metal Industry Co. v Superior Court of Cal., Solano Cty, No 85-693 (Supreme Court, US) [480 US 102 (1987)] Judgment 24 February 1987.

Omni Capital Int'l v Rudolf Wolff & Co., Ltd., No 86-740 (Supreme Court, US) [484 US 97 (1987)], Judgment 8 December 1987.

Burnham v Superior Court of California, County of Marin, No 89-44 (Supreme Court, US) [495 US 604 (1990)] Judgment 29 May 1990.

Morguard Investments Ltd. c. De Savoye, Case 21116 (Supreme Court, Canada), Judgment 20 December 1990.

Carnival Cruise Lines, Inc. v Shute, No. 89-1647 (Supreme Court, US) [499 US 585 (1991)] Judgment 17 April 1991.

Case XI ZR 206/90 (BGH), Judgment 2 July 1991.

Siderman de Blake and others v Argentina and others, No 85-5773 (US Court of Appeals, US) [965 F.2d 699 (9th Cir. 1992)] Judgment of 22 May 1992.

Government of Canada v Employment Appeals Tribunal and Burke, Case 95 ILR 467, Judgment 12 March 1992.

Saudi Arabia v Nelson, No 91-522 (Supreme Court, US) [507 US 349 (1993)] Judgment of 1993.

Al- Adsani v Government of Kuwait, (Court of Appeal, England and Wales), Judgment of 29 March 1996, [1996] 2 LRC 344

Case 61/2000 (Constitutional Court, Spain), Judgment 13 March 2000.

El-Hadad v United Arab Emirates, No 99-7220 (District of Columbia Circuit Court, US) [216 F.3d 29 (D.C. Cir. 2000)] Judgment of 16 June 2000.

Lubbe v Cape Plc, Case 1 W.L.R. 1545 (House of Lords, UK) Judgment 20 July 2000 [2000] UKHL J0720-4.

Fendi S.R.L v Condotti Shops, Inc., No. 3D99-2258 (District Court of Appeal of Florida, Third District) [754 So. 2d 755 (Fla. Dist. Ct. App. 2000)], Judgment 8 March 2000.

Société Eram Shipping Company Limited (Respondents) and others v Hong Kong and Shanghai Banking Corporation Limited (Appellants) (House of Lords, United Kingdom) [2003] UKHL 30, Judgment 30 of 12 June 2003.

Dame Soliman v École saoudienne de Paris et Royaume d'Arabie saoudite, Case 00-45.629 (Court of cassation, France), Judgment 20 June 2003.

Beals c. Saldanha, Case 2003 CSC 72 (Supreme Court, Canada), Judgment 18 December 2003.

Case no 02--17974 (Court of Cassation, France), Judgment 30 March 2004.

Monster Cable Products Inc v Audio Marketing Services, Case no 07--15.823 (Cour de cassation, France), Judgment 22 October 2008.

AK Investment CJSC v Kyrgyz Mobil Tel Ltd & Ors (Isle of Man), Case JCPC 2009/0064 (Supreme Court, UK), Judgment 10 March 2011 [201]1 UKPC 7.

Goodyear Dunlop Tires Operations, S.A. v Brown, No 10-76 (Supreme Court, US) [564 US 915 (2011)] Judgment 27 June 2011.

J. McIntyre Mach., Ltd. V Nicastro, No 09-1343 (Supreme Court, US) [564 US 873 (2011)], Judgment 27 June 2011.

Star Reefers Pool Inc. v JFC Group Co. Ltd, Case [2012] EWCA Civ 14 (Court of Appeal, England and Wales) Judgment 20 January 2012.

Case no 11-40101 (Cour de cassation, France), Judgment 29 February 2012.

Club Resorts Ltd. v Van Breda, Case 2012 SCC 17 (Supreme Court, Canada), Judgment 18 April 2012.

Case no VII ZR 25/12 (BGH, Germany), Judgment 5 September 2012.

Case no 36358, (Cour of Appeal, Luxembourg), Judgment 6 November 2013 (2014) *Journal des tribunaux Luxembourg* 81, with obs. P Kinsch.

Kazemi Estate v Islamic Republic of Iran, Case 35034, Judgment 10 October 2014, [SCC] 62.

Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs, Case 2015/0063 (Supreme Court, UK), Judgment 18 October 2017 [2017] UKSC 62.

États-Unis d'Amérique c. P.V.N, Case S.15.0051.N (Court of cassation, Belgium), Judgment of 4 March 2019 (2020) Journal des Tribunaux 595.

Ambassade du Ghana, Case 18-13.790 (Court of cassation, France), Judgment appeal of 27 November 2019.

ICE, Case 18-24.643 (Court of cassation, France), Judgment of appeal 1 July 2020.

BIBLIOGRAPHY

Akehurst M, 'Jurisdiction in International Law' (1972-73) 46 *British Yearbook of International Law* 145.

Barceló III J J and Clermont K M, *A Global Law of Jurisdiction and Judgments: Lessons from The Hague* (Kluwer Law International, The Hague, London, New York 2002).

Batiffol H, 'Observations sur les liens de la compétence judiciaire et de la compétence législative', (1962) 9 *Netherlands International Law Review, Special Issue: De Conflictu Legum, Essays Presented to RD Kollewijn and J Offerhaus*, 55.

Brand R, 'Access to Justice Analysis on a Due Process Platform' (2012) 112 *Columbia* Law Review Sidebar 76.

Briggs A, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008).

Carmody C, Iwasawa Y and Rhodes S (eds.), *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (ASIL Baltimore 2003).

Childress III D.E, 'V° Jurisdiction, Limits under International Law'*, Encyclopedia of Private International Law* (Elgar 2017) 1055.

Corneloup S, 'Les liens entre *forum* et *ius* : réflexion sur quelques tendances en droit international privé contemporain', *Mélanges en l'honneur de B. Ancel* (Ipralex 2017) 461.

Cuniberti G, 'The International Market for Contracts – The Most Attractive Contract Laws' (2014) 34 *Northwestern Journal of International Law & Business* 455.

Dodge W.S and Dodson S, 'Personal Jurisdiction and Aliens', (2018) 116 *Michigan Law Review*, 1205.

Dodge W. S, Gardner M and Whytock C, 'The Many State Doctrines of Forum Non Conveniens' (2023) 72 *Duke Law Journal*, 1163-1256.

Dodson S, 'Personal Jurisdiction in Comparative Context' (2020) 68 *The American Journal of Comparative Law*, 701.

Fernandez Arroyo D, *Compétence exclusive et compétence exorbitante dans les relations privées internationales* (Collected Courses of the Hague Academy of International Law 323 2006) 23, 37.

Gardner M, 'Retiring Forum Non Conveniens' (2017) 92 *New York University Law Review*, 390.

Garnett R, 'Should the Sovereign Immunity Be Abolished?' (1999) 20 *Australian Yearbook of International Law* 175.

Hartley T and Dogauchi M, *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention* (2013).

Hess B and Mantovani M, in F Ferrari/ P Fernández Arroyo (eds.), *Private International Law – Contemporary Challenges and Continuing Relevance* (2019), 293 ff.

Joubert N, 'Chroniques d'un malentendu: les relations entre les immunités de juridiction et le Règlement Bruxelles I' (2014) Revue de droit commercial 53.

Lowenfeld A.F, *International Litigation and the Quest for Reasonableness, General Course on Private International Law*, (Collected Courses of the Hague Academy of International Law 82 1994) 245.

Mann F.A, *The Doctrine of Jurisdiction in International Law* (Collected Courses of the Hague Academy of International Law 1 1964) 111.

Mann F.A, *The Doctrine of International Jurisdiction Revisited after Twenty Years* (Collected Courses of the Hague Academy of International Law 9 1984) 186.

Mayer P, 'Droit international privé et droit international public sous l'angle de la notion de compétence'(1979) *Revue critique de droit international privé* 1.

Mayer P, Heuzé V and Remy B, *Droit international privé* (LGDJ 12th ed. 2019).

Michaels R, 'Two Paradigms of Jurisdiction' (2006) 27 *Michigan Journal of International Law* 1003.

Michaels R, 'V° Jurisdiction, Foundations', *Encyclopedia of Private International Law* (Elgar 2017) 1042.

Muir Watt H and Bureau D, *Droit international privé* (5th ed 2021).

Orakhelashvili A, 'Jurisdictional Immunity of States and General International Law – Explaining the Jus Gestionis v. Jus Imperii Divide' in T Ruys, N Angelet and L Ferro (eds.), The Cambridge Handbook of Immunities and International Law (Cambridge 2019) 122.

Pavoni R, 'The Myth of the Customary Nature of the United Nations Convention on the State Immunity: Does the End Justify the Means ?', in A van Aaken and I Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018) 282.

Philip A, 'The Global Hague Judgments Convention: Some Comments' and D Bennett, 'The Hague Convention on Recognition and Enforcement of Foreign Judgments – A failure of characterization', in T Einhorn and K Siehr (eds), *Intercontinental Cooperation Through Private International Law: Essays in Memory of Peter E. Nygh* (T.M.C. Asser Press, The Hague 2004).

Silberman L. J and Yaffe N.D, 'The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third of Conflict of Laws—Judicial Jurisdiction Over Foreign Defendants and Party Autonomy in International Contracts' (2017) *Duke Journal of Comparative and International Law 27*, L. 405.

Szpunar M, 'Territoriality of Union Law in the era of globalisation', in D Petrlík, M Bobek, JM Passer, A. Masson (eds), *Evolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux - Liber Amicorum Jiří Malenovský* (Bruylant 2020), 149 ff.

Takahashi K, 'Damages for Breach of a Choice-of-Court Agreement' (2008) *Yearbook Private International Law*, 57.

Takahashi K, *Japan's New Act on International Jurisdiction* (Smashwords 2011).

Takahashi K, 'The Jurisdiction of Japanese Courts in a Comparative Context' (2015) 11 *Journal of Private International Law* 103.

Usunier L, 'Regulating the Jurisdiction of Courts in Int'l Litigation: Towards a Global Answer in Civil and Commercial Matters', (2007) 9 *Yearbook Private Int'l Law* 541.

Usunier L, *La régulation de la competence juridictionnelle en droit international privé* (Litec 2008).

Van Calster G, 'Lis Pendens and third states: the origin, DNA and early case-law on Articles 33 and 34 of the Brussels Ia Regulation and its "forum non conveniens-light" rules' (2023) 19 *Journal of Private International Law*, 363.

Von Merhen AT, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983) 63 *Boston University Law Review*, 279.

Von Mehren AT and Trautman D, 'Jurisdiction to Adjudicate: A Suggested Analysis' (1966) 79 *Harvard Law Review*, 1121.

Weller M, *Mutual Trust: A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?* (Collected Courses of the Hague Academy of International Law 49 2022) 423.